INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Contract clause involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:	
Dade Brothers v. *United States*, 325 F. 2d 239	1
Sutton v. *United States*, 256 U.S. 575	9
Statutes:	
41 U.S.C. 321	8
National Labor Relations Act, 29 U.S.C. 141	8

727-623—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 910

DADE BROTHERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. A1–A5) is reported at 325 F. 2d 239.

JURISDICTION

The judgment of the Court of Claims was entered on December 13, 1963. The petition for a writ of certiorari was filed March 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

This is an action by a cost-plus contractor to recover the cost of defending litigation in the New Jersey courts. The government defended the instant suit upon the ground that the litigation resulted from a conspiracy between the contractor and a labor union to

violate the New Jersey plaintiffs' rights as employees under a collective bargaining agreement which the government contract required the contractor to perform. The questions presented are:

1. Whether the court erred in approving the Corps of Engineers Claims and Appeals Board finding upon the evidence that the government contracting officer did not know about or participate in the conspiracy.

2. Whether the Armed Services Board of Contract Appeals and the court below gave improper effect to the findings of conspiracy in the New Jersey litigation.

CONTRACT CLAUSE INVOLVED

Article IV(1)t. of the government contract here involved is set forth at pages A7–A8 of the petition.

STATEMENT

This action seeks reimbursement for expenses incurred by petitioner Dade Brothers, Inc.,[1] in connection with certain litigation in the New Jersey courts. Dade had a cost-plus-fixed-fee contract dated May 11, 1952, with the Army Corps of Engineers, providing for the preparation for shipment of certain military equipment to bases in Morocco and Greenland (Pet. A7). This work was to be performed at the docks in Jersey City, New Jersey. The contract provided, *inter alia* (Pet. A80):

> 1a. The Contractor will abide by all the terms and conditions of the Union Agreement with the following groups of employees
>
> * * * * *

[1] Petitioner Chesapeake Industries, Inc., is the assignee of Dade's rights in this action (Pet. App. A6).

1a2. The Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees.

The union agreement between Dade and Marine Warehousemen's Local 1478 gave the employees certain seniority and employment rights (Pet. A9–A10).

In late 1952, members of Local 1478 filed three suits in the New Jersey courts against Dade, two officers of Dade (a vice-president and the labor relations manager) and certain officers of Local 1478 alleging that the defendants had conspired to deprive them of seniority rights and employment to which they were entitled under the union agreement (Pet. A10–A11). After a jury trial, the trial court entered a judgment against Dade on the verdict in the amount of $25,841.60 compensatory damages and $8,600 punitive damages (Pet. A12). No verdicts were returned for or against the individual defendants (Pet. A12, A64).

The evidence showed that the men on the particular job in question were employed on a day-to-day basis. The number required would be selected each morning by an employee of Dade, known as the "hiring boss," at a shape-up on the pier. The hiring boss was an officer of the union, and the evidence was that he used his position to discriminate against "disloyal" members of the union. Dade took the position at trial that it was the victim of dissension within the union and that it could not control the conduct of its hiring boss. However, the jury evidently disagreed. In affirming the judgment, the Appellate Division of the

New Jersey Superior Court made an extensive review of the evidence (Pet. A65–A70) and concluded (Pet. A70)—

> there was ample proof to warrant a finding by the jury that the employer and the union acted in concert in wilfully and maliciously interfering with plaintiffs' right to employment under the collective bargaining agreement.

The New Jersey Supreme Court affirmed without opinion (Pet. A18).

While the New Jersey litigation was proceeding, Dade made repeated requests to the contracting officer for reimbursement of litigation expenses under Article IV(1)t. of the contract (Pet. A20–A27). This article provides that the government will reimburse the contractor for expenses and costs of "litigation in connection with claims of third parties arising out of the performance of this contract * * *" (Pet. A7–A8). On October 27, 1955, after the decision of the State Supreme Court, the contracting officer formally denied Dade's claim under the Disputes clause of the contract (Pet. A73–A80).

Dade appealed from the contracting officer's decision and a three-day hearing was held by the Corps of Engineers Claims and Appeals Board (Pet. A30–A31). Extensive testimony was presented by an executive vice president of Dade who had been the top representative of Dade at the Claremont Terminal (where the work under the contract was performed) but had not been in charge of operations at the Terminal. He testified that he had never entered into a conspiracy with any union representative against the persons who had been plaintiffs in the New Jersey

suit; that Dade had no control over the practices of its hiring boss; and that he did not know whether the hiring boss hired in conformity with the union agreement. He also testified that government agents were apprised of and acquiesced in all major policy decisions of Dade, including major employer-employee decisions (Pet. A30–A31). Dade also placed in the record excerpts from testimony concerning racketeering and port security on the New York-New Jersey waterfront given in April 1953 by Colonel Tench, former District Engineer of the Atlantic District, Corps of Engineers, before a subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate (Pet. A31). Colonel Tench, who had jurisdiction of operations under the contract, had testified that he knew that men with criminal records dominated the union on the New York waterfront and, through the shape-up system, could dictate who would be hired, despite the employer's wishes (Pet. 4–5). In one of the excerpts Colonel Tench agreed with a statement of the late Senator Tobey to the effect that men with criminal records were employed in Dade's operation and that, since they dominated the union, they could not be fired without causing a crippling strike (Pet. 5).

The Corps of Engineers Claims and Appeals Board affirmed the decision of the contracting officer (Pet. A47–A63). The Board accepted the finding of the New Jersey courts [2] that Dade had participated in the

[2] The pleadings; judgments, transcript and appeal proceedings before the New Jersey courts were made a part of the record before the Board by stipulation of the parties (Pet. A57).

conspiracy (Pet. A59–A60). With respect to the evidence that the government was aware of the labor conditions that Dade faced, the Board stated (Pet. A62):

> [T]here has been no evidence or even any allegation indicating that the contracting officer was aware of or had reason to be aware of the existence of the conspiracy found by the New Jersey Courts. The most that can be said is that the contracting officer knew generally of the labor conditions at the waterfront, but that is a far cry from knowledge of conspiracy.

The decision of the Corps of Engineers Claims and Appeals Board was affirmed by the Armed Services Board of Contract Appeals (Pet. A38–A46). Petitioners then brought this action.

The Court of Claims held that the litigation-reimbursement clause did not apply to the New Jersey litigation "because [Dade] breached its agreement with the Government or failed to perform that contract faithfully" (Pet. A4). It also approved the finding of the Corps of Engineers Claims and Appeals Board with respect to the contracting officer's lack of knowledge of the conspiracy which was the subject of the New Jersey litigation (Pet. A5). Alternatively, the Court of Claims held that (Pet. A5)

> wrongful participation by government officials in a tortious conspiracy such as was found here would put them far outside their authority to represent the United States with respect to this contract. * * *

ARGUMENT

The Court of Claims properly refused to upset the holdings of the contracting officer and two Appeals Boards that the New Jersey litigation arose out of petitioners Dade's breach of contract and accordingly was not covered by the litigation-expenses reimbursement clause.[5] There is no conflict of decisions and no warrant for review by this Court.

1. Petitioners' attack on the judgment below rests upon their claim that the United States participated in the conspiracy for which Dade was held liable in the New Jersey litigation (Pet. 11–15). Their contention, while not spelled out, appears to be that participation by the United States in the conspiracy to deprive certain members of Local 1478 of their employment and seniority rights constitutes a waiver of the clause in the contract requiring observance of the union agreement; that accordingly there was no breach of the contract; and that therefore the petitioners are entitled to recover their expenses and costs under Article IV(1)t. which provides for reimbursement where the litigation is "in connection with claims of third parties arising out of performance of this contract * * *."

---

[5] It may well be, as petitioners imply (Pet. 3–4), that Dade was coerced by a gangster-dominated union into following a hiring policy with which Dade's top management did not agree. However, if true, this would not relieve Dade of responsibility for the conduct of its employees nor transform the conduct which gave rise to the New Jersey litigation into conduct which must be accepted as "performance of the contract."

Petitioners' argument, however, rests on an interpretation of the evidence contrary to that reached by the Corps of Engineers Claims and Appeals Board, which found (Pet. A62):

> [T]here has been no evidence or even any allegation indicating that the contracting officer was aware of or had reason to be aware of the existence of the conspiracy found by the New Jersey Courts. The most that can be said is that the contracting officer knew generally of the labor conditions at the waterfront, but that is a far cry from knowledge of conspiracy.

Under the Disputes Clause of the contract, this finding is binding upon petitioners unless it is shown to be arbitrary, capricious or unsupported by substantial evidence. See also 41 U.S.C. 321. As the Court of Claims noted (Pet. A5), no such showing has been made. The finding, therefore, constitutes a complete answer to petitioners' contentions regarding government participation in the conspiracy.

Moreover, as the Appeals Board noted (Pet. A60), participation by the government agents in a conspiracy to deprive employees of employment and seniority rights under a collective bargaining agreement would have been contrary to the policy of the National Labor Relations Act (29 U.S.C. 141). Thus, the Court of Claims had a substantial basis for holding that, even if the government agents had participated in the conspiracy, they would have been acting outside the terms of their authority to represent the United States and thus their actions could not constitute a valid

waiver of any of the government's rights (Pet. A5). Cf. *Sutton* v. *United States*, 256 U.S. 575.

2. Petitioners also contend that the Court of Claims improperly applied the doctrine of res judicata or collateral estoppel to the New Jersey judgment thereby allowing the United States "to prevail without offering substantial evidence to rebut petitioner's prima facie case" (Pet. 14–15). While certain language of the contracting officer may read as if the New Jersey judgment were being given conclusive effect (Pet. A80), it is clear from the willingness of the Corps of Engineers Claims and Appeals Board to consider additional testimony (Pet. A30–A31, A45, A58–A59) that the Court of Claims was correct in stating that the New Jersey proceedings were considered as evidence by the administrative tribunals but were not given conclusive effect (Pet. A4). The short of the matter is that the jury verdict in the New Jersey proceedings and the review of the evidence on appeal by the Appellate Division constituted persuasive evidence that petitioners had violated their contract. Petitioners' problem is not that the determinations of the State courts were given conclusive effect but merely that they were unable to present evidence to support a contrary conclusion.

Petitioners also imply that the New Jersey proceedings were considered for their bearing on a question not there involved—*i.e.*, whether the United States participated in the conspiracy (Pet. 15). However, it seems clear that the New Jersey proceedings were considered for their bearing on the question of

whether the conduct of Dade which gave rise to the New Jersey litigation constituted performance of the government contract (Pet. A45–A46, A57–A60, A80). As to the separate question of the conduct of government agents, the administrative holding was merely that, on the basis of all the evidence in the case—including testimony before the subcommittee of the Senate Committee on Interstate and Foreign Commerce, testimony of an executive vice-president of Dade before the Corps of Engineers Claims and Appeals Board, and the proceedings in the New Jersey courts (Pet. A30–A31)—Dade had failed to prove that the United States had approved of or participated in the conspiracy in a manner constituting waiver of the clause of the government contract requiring observance of the union agreement (Pet. A62). Dade clearly had the burden of proof on this point, and the administrative finding that this burden was not discharged in no way involved an application of res judicata or collateral estoppel to the New Jersey judgment.

3. There is no merit to petitioners' further contention that the holding of the Court of Claims "implies" that reimbursement would be denied even if Dade's conduct had not actually violated the contract (Pet. 17). No such implication is to be found in either the language or the holding of the Court of Claims which based its decision upon the findings of the Board of Contract Appeals that Dade had failed to show that the New Jersey litigation arose out of performance of the contract (Pet. A4).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
SHERMAN L. COHN,
ROBERT V. ZENER,
Attorneys.

APRIL 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964